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NO. 93-1353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

UNITED STATES OF AMERICA, Petitioner

v.

DONALD L. SIMPSON and RODOLFO MOLINA, JR., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT MOLINA'S BRIEF IN OPPOSITION

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The Respondent, Rodolfo Molina, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, filed by Petitioner United States of America, seeking review of the Ninth Circuit Court's judgment in this case.

CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment I provides:

> **Freedom of religion, speech and press; peaceful assemblage; petition for grievances**
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VIII provides:

> **Excessive bail, fines, punishments**
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

STATEMENT OF THE CASE

Respondent concurs with the Statement of the Case as presented by the Government, and supplements that Statement with the fact that the only count of the Indictment, Court II, which alleged a substantive drug offense against Respondent, and of which he was acquitted, involved between one and one-half to two and one-half (1.5 - 2.5) grams of cocaine. [92-10158, Resp. CA Br. 24; Govt. CA Br. 25; CA Excerpt of Record 53]

REASONS WHY THE PETITION SHOULD BE DENIED

The government contends that this Court should grant certiorari because this case presents the same issue as United States v. Shabani, 993 F.2d 1419 (9th Cir., 1993); Cert. granted,

#93-981 (February 22, 1994), stating that the Court's decision in *Shabani* would effect the outcome of this case.[1] Accordingly, Respondent incorporates by reference Respondent's Brief in Opposition filed in United States v. Shabani.

The Government's argument and reasoning why this Court should grant certiorari, in both United States v. Shabani and the case at bar, fails to consider that there may be legitimate, constitutional reasoning upon which the Ninth Circuit Court of Appeals has consistently required proof of an overt act for a conviction under Title 21, U.S.C. §846, although not explicitly stated by that Court in its opinions. Respondent respectfully suggests to this Court that the Ninth Circuit Court of Appeal's position is logically supported by the First and Eighth Amendments to the United States Constitution.

It is submitted that inherent in the Ninth Circuit Court's requirement that an overt act be proven to sustain a conviction under Title 21, U.S.C. §846, is the Court's unstated belief that to convict a person of conspiracy without an overt act would be in violation of the First Amendment to the United States Constitution.

The First Amendment to the United States Constitution prohibits congressional restraint upon freedom of speech and thought. As argued by the government, the overwhelming weight of authority now holds that proof of an overt act is not necessary for a conviction under any criminal conspiracy statute which does not specifically require proof of an overt act. Accordingly, under

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[1] See, Petition, pp 5-6.

Title 21, U.S.C. §846, all that is necessary to be proven for conviction of conspiracy is an agreement between two or more people to commit at least one crime as charged in the Indictment, (or, any offense defined in the subchapter [a narcotics offense]), and becoming a member of the conspiracy knowing at least one of its objects, with the intent to help accomplish it. Ninth Circuit Criminal Jury Instruction 8.05A (1992).

As a result, under Title U.S.C. §846, with no action or overt act needed to be proven for conviction, it follows that a person may be convicted solely upon his or her words or expressed thoughts, and not actions. If the First Amendment right to freedom of speech is to have any meaning when applied to criminal conspiracy statutes, those criminal conspiracy statutes which do not require proof of an overt act, to include Title 21, U.S.C. §846, must be declared to be in violation of the First Amendment to the United States Constitution.

It is further submitted that the majority position, that Title 21, U.S.C. §846 requires no overt act and that a citizen may be convicted solely upon his or her words or expressed thoughts, is in violation of the Eighth Amendment to the United States Constitution.

The Eighth Amendment to the United States Constitution provides that no cruel or unusual punishment shall be inflicted upon the citizenry of the United States. To convict a person solely for speech or thought, and then to sentence that person to

inordinately long periods of incarceration, is truly cruel and unusual punishment.

For example, in the case at bar, Respondent Molina was sentenced, pursuant to Title 21, U.S.C. §846 and the United States Sentencing Guidelines, to three hundred sixty-five (365) months imprisonment.[2] This sentence, in excess of thirty (30) years imprisonment, resulted from conversations about five hundred (500) kilograms of cocaine. The only alleged cocaine involved, the sample alleged to have been delivered on January 28, 1991, had a total weight of one and one-half to two and one-half (1.5 - 2.5) grams. Significantly, Respondent Molina was acquitted on that count (Count II). Count II was "... the only substantive [drug] offense with which they were charged."[3] The net result, therefore, was that Respondent Molina received over thirty (30) years imprisonment for talking about committing a narcotics offense, as he was acquitted of any substantive allegation of possession or distribution of narcotics.

Under the majority position, mere talk, with no substantive offense proven, can result in extremely long and harsh imprisonment. Clearly, this is cruel and unusual punishment, and must be declared to be in violation of the Eighth Amendment to the United States Constitution.

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[2] See, Petition, p 2.

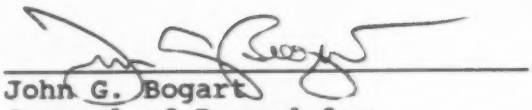
[3] See, Petition, p 4.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

DATED: May 16, 1994.

RESPECTFULLY SUBMITTED,



John G. Bogart
Counsel of Record for
Respondent Rodolfo Molina, Jr.

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Respondent Molina's Brief in Opposition was mailed/delivered this 6th day of May, 1994, to:

Mr. Drew S. Days, III
Solicitor General
Department of Justice
10th & Constitution Ave., N.W., Room #5614
Washington, D.C. 20530

I hereby certify that one (1) copy of the Respondent Molina's Brief in Opposition was mailed this 6th day of May, 1994, to:

Rodolfo Molina, Jr.
% Minnesota Correctional Facility
Oak Park Heights
Post Office Box 10
Stillwater, Minnesota 55082-0010

DATED this 6th day of May, 1994.

John G. Bogart
Counsel of Record for
Respondent Rodolfo Molina, Jr.